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No. 88-1550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Railroad Safety Act of 1970, 45 U.S.C. Sections 421-44 and the Regulations Promulgated Thereunder Preempt the Arkansas Railroad Right of Way Vegetation Statute, *Ark. Code Ann.* Section 23-12-201 (1987)?

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BETTIE L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

BRIEF IN OPPOSITION

Bettie Mackey, Executrix of the Estate of Cleo Franklin Mackey, deceased responds to Missouri Pacific Railroad Company's Petition for Certiorari of an Arkansas Supreme Court judgment holding that a federal regulation covering railroad roadbed vegetation does not preempt an Arkansas statute covering the growth of vegetation on railroad right of ways 100 yards either side of a crossing of a public road.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court from which this appeal is taken is reported as *Missouri P. R.R. v. Mackey*, 297 Ark. 137, 760 S.W. 2d 59 (1988), in which

the Arkansas Supreme Court reversed and remanded the judgment of the Sebastian County Circuit Court, the Honorable Floyd G. Rogers, Circuit Judge, presiding. The Arkansas Supreme Court opinion is reproduced in the Appendix of this Respondent's Response to the Appellant's Petition for Writ of Certiorari. The Arkansas Supreme Court's order denying Missouri Pacific Railroad Company's Petition for Rehearing is unreported and is reproduced in the Appendix of this Response Brief.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Federal Statutes Involved

(i) Section 101 of the Federal Railroad Safety Act of 1970, 45 U.S.C. Section 421 (1982), provides:

> *Section 421. Congressional Declaration of Purpose.*
>
> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and *to reduce deaths and injuries to persons and to reduce damage to property caused by accidents*, involving any carrier of hazardous materials.

(ii) Section 205 of the Railroad Safety Act of 1970, 45 U.S.C. Section 434, (1982), provides:

> Section 434. National Uniformity of Laws, Rules, Regulations, Orders, and Standards Relating to Railroad Safety and State Regulation.
>
> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement.* A state may adopt or continue in force additional or more

stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essential local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

B. Arkansas Statute Involved

Ark. Code Ann. Section 23-12-201 (1987) provides:

Section 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.

(a) All railroad corporations operating in this state shall maintain their right-of-way *at or around any railroad crossing of a public road or highway* free from grass, trees, bushes, shrubs, or other growing vegetation *which may obstruct the view of pedestrians and vehicle operators using the public highways.* The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

(b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

C. Federal Regulations Involved

(i) 49 C.F.R. Section 213.31, 213.37 (1987) provide:

Subpart B—Roadbed

Section 213.31 *Scope.*

This subpart prescribes *minimum requirements for roadbed and areas immediately adjacent to roadbed.*

* * * *

Section 213.37 Vegetation.

Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled *so that it does not—*

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communications lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

STATEMENT OF THE CASE

On July 27, 1984, Cleo Mackey was killed when the pickup truck he was driving was struck by a Missouri Pacific Railroad Company train at a rural state highway crossing near Branch, Arkansas. The decedent's wife, Bettie Mackey, as Executrix of her deceased husband's estate brought this negligence action against Missouri Pacific Railroad Company seeking money damages. In the Respondent's Complaint, the Executrix alleged, *inter alia*, that the Defendant railroad's maintenance of the right-of-way at the location of the accident was in violation of *Ark. Code Ann.* Section 23-12-201 (1987) (formerly codified as *Ark. Stat. Ann.* Section 73-631) and that such violation amounted to negligence which was a proximate cause of the decedent's death. In its answer to the Amended Complaint, the Defendant raised as an affirmative defense that *Ark. Stat. Ann.* Section 73-631 was invalid, unconstitutional and unenforceable alleging that the aforementioned state statute had been preempted by Federal law, specifically by certain provisions of the Federal Railroad Safety Act of 1970 and by the rules and regulations promulgated thereunder by the Federal Railroad Administration. Congress enacted the Federal Rail-

road Safety Act ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971 (1970) (codified at 45 U.S.C. Sections 421-44 (1982 and Supp. IV 1987)), in response to deteriorating railroad tracks, roadbed and safety equipment. In the development and passage of the aforementioned Act, Congress, in the following language, expressly set out its intent in passing the said Act:

> "Consequently there is a strong consensus which makes it appear clearly that *the time is now here for broad scale Federal legislation with provisions for active state participation to assure a much higher degree of railroad safety in the years ahead.*"
>
> "With respect to the reported Bill S 1933 the Task Force recommended that *existing state requirements remain in effect until preempted by Federal actions.* The Department of Transportation in its proposal followed the Task Force recommendation with respect to existing state statutes and recommended that state statutes then in effect continue until preempted by Federal action . . . the Bill as passed by the Senate preserved existing state statutes until preempted. It also permitted the states to regulate in new areas until preempted."
>
> "[The FRSA"] provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the state will no longer have authority to establish statewide standards with respect to rail safety. The state may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce."

H.R. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4105, 4108, 4109, and 4116.

Prior to trial Appellant's Motion for Partial Summary Judgment as to any claim that Missouri Pacific's maintenance of the right-of-way and crossing in question was in violation of state law on the ground that the Arkansas statute was unconstitutional and preempted by Federal law was denied. The Appellant's Motion for Partial Summary Judgment on the same issue during the pre-trial proceedings was also denied by the trial court. On September 10, 1987 pursuant to a jury verdict, the trial court entered judgment against the Appellant and in favor of the Respondent in the sum of $450,000.00 in actual damages and $100,000.00 in punitive damages. The aforementioned preemption issue was again raised by the Appellants in its appeal from the trial court's judgment to the Arkansas Supreme Court. In an opinion filed November 21, 1988, the Arkansas Supreme Court reversed the judgment and remanded the case for a new trial. In so doing the Arkansas Supreme Court further upheld the trial court's finding that the Arkansas vegetation statute had not been preempted by Federal law. In rejecting the Appellant's contention that the aforementioned Arkansas statute, covering vegetation growth in railroad right-of-ways, was preempted by the Railroad Safety Act of 1970, the Arkansas Supreme Court considered Congress' intent as evidenced by the heretofore cited 1970 U.S. Code *Congressional & Administrative News* at 4116, which reads almost identical to the Federal regulation in question, and then applied the three prong preemption test as set forth in *Hillsboroughs County, Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985), and found no preemption. *Missouri Pacific Railroad v. Mackey*, 297 Ark. at 146, 760 S.W. 2d at 64 (1988); reproduced in Appendix at page 1a. It should be noted that the Arkansas Supreme Court further held that the testimony in the case at bar was broad enough to include the "roadbed" as being part of the area where the growth had occurred and it was obvious that the testimony also

covered the right of way outside the roadbed. Therefore, the Appellant was in violation of not only the state statute in issue, but also the Federal regulation of vegetation in roadbeds and areas immediately adjacent thereto.

A Petition for Rehearing was filed by the Defendant on December 8, 1988. The Arkansas Supreme Court denied the Defendant's Petition for Rehearing on December 19, 1988. On February 20, 1989, the Defendant filed its Notice of Appeal herein with the Arkansas Supreme Court and with the Circuit Court of Sebastian County, Arkansas.

ARGUMENT

I. Introduction

There is not, nor has there ever been, any Federal standard for minimum sight distance at train crossings nor was it Congress' intent to totally preempt the field of railroad safety by the passage of the Federal Railroad Safety Act of 1970. Therefore, the question presented by this appeal is insubstantial and the Appellant's Petition for Certiorari should be denied. The decision of the Arkansas Supreme Court on the maintenance of railroad right of way at public highway crossings preemption issue is supported by the record and this court should affirm the judgment below on this issue. It is clear under Federal law that although a claim of Federal question has been plainly made, where it lacks all color of merit and has no substance or foundation, the mere fact that it is raised is not sufficient to give Federal Supreme Court jurisdiction. *New Orleans Water Works Co. v. Louisiana*, 185 U.S. 336, 46 Lawyers Edition 936, 22 Supreme Court 691 (1902). The Federal question necessary for Appellate jurisdiction in Supreme Court must be one not in mere form, but in substance. *Cuyahoga River Power Company v. Northern Ohio Traction & Light Co.*, 252 U.S. 388, 64 Lawyers Edition 626, 40 Supreme Court 404 (1920).

It is evident by viewing the language used by the Arkansas Supreme Court in its opinion, at page 9a of the Appendix, that it ascertained Congress' intent in passing the aforementioned Federal Railroad Safety Act of 1970 from a discussion of H. R. 91-1194 reprinted in 1970 U.S. Code Congressional & Administrative News at 4116, specifically that "until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area". The Arkansas Supreme Court also examined the plain language of the Arkansas railroad right of way at public highway crossings vegetation statute as compared to the Federal railroad roadbed vegetation regulation and found that "it is obvious on the face of the statute and regulation that the Federal regulation, 49 C.F.R. Section 213.37 (reproduced at page 4 of Respondent's Brief), is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employees performance of their duties. On the other hand the Arkansas statute, specifically, ACA 23-12-201 (reproduced at page 3-4 of Respondent's Brief), clearly is intended to protect pedestrians and operators of vehicles".

The Arkansas Supreme Court further went on and found that there was no congressional scheme in the case at bar that was so comprehensive that no room was left for state regulation, nor was the state law in question in this case an obstacle to the accomplishment of the congressional objectives of the Federal Railroad Safety Act of 1970. In fact, at Section 101 of the Federal Railroad Safety Act of 1970, which is set forth in 45 U.S.C. Section 421 (1982). (See page 2 of Respondent's Brief) "Congress declares that the purpose of this chapter is to . . . . reduce death atnd injuries to persons and to reduce damage to property caused by accidents. . .". Based upon the aforementioned purpose of Congress in enacting the Railroad Safety Act of 1970, it is illogical to believe that Congress intended that this piece of legislation preempt

and repeal all state sight distance at train crossing statutes and allow railroad right of ways at highway crossings to be overgrown with vegetation so that the view of persons using these highways would be so obstructed that a potentially dangerous condition would be allowed to exist.

Based upon the Arkansas Supreme Court's findings that it was not Congress' intent in passing the FRSA to preempt the Arkansas railroad right of way at highway crossing vegetation statute, that there was no congressional scheme in the case at bar that was so comprehensive that no room was left for state regulation, and that the state law in question in this case was not an obstacle to the accomplishment of the congressional objectives of the Federal Railroad Safety Act of 1970, the question presented by the Appellant, although Federal in nature, is insubstantial and lacking in substance. This failure of the Appellant to raise a substantial Federal question requires that the Arkansas Supreme Court judgment be affirmed and the Appellant's Petition for Writ of Certiorari be denied.

II. The Arkansas Supreme Court Correctly Upheld the Arkansas Vegetation Statute

The Arkansas railroad vegetation statute provides:

> Section 23-12-201. Maintenance of Right-of-Way Free From Obstructions—Penalty
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way *at or around any railroad crossing of a public road or highway free* from grass, trees, bushes, shrubs, or other growing vegetation *which may obstruct the view of pedestrians and vehicle operators using the public highways.* The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

Ark. Code Ann. Section 23-12-201 (a) (1987). The Federal regulation in question in the case at bar provides:

Subpart B—Roadbed

Section 213.31 Scope.

This subpart prescribes *minimum requirements for roadbed and areas immediately adjacent to roadbed.*

* * * *

Section 213.37 Vegetation.

Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communications lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. Section 213.31, .37 (1987)

A recent Fifth Circuit decision addressed the exact issue that has been raised in the case at bar. *Missouri Pacific Railroad v. Railroad Commission of Texas*, 833 Fd. 2d 570 (5th Cir. 1987). A Texas District Court had earlier ruled that the Federal Railroad Safety Act ("FRSA") Pub. L. No. 91-458, 84 Stat. 971 (1970), codified at 45 U.S.C.A. Section 421-441 (1987), had totally preempted a Texas statute prohibiting vegetation to remain on railroad right of ways five hundred (500) feet either side of the railroad crossing with a public road. The Fifth Circuit Court of Appeals stated that the Federal law controlled only that vegetation which was on railroad property that was in the roadbed or

immediately adjacent thereto. They determined that the Texas statute was intended to cover the remaining area of the railroad right-of-way. They reasoned, quite logically, that the aforementioned pertinent Federal Regulation concerning vegetation on railroad property, which is immediately adjacent to the roadbed, dealt entirely with train and crew operations and was not designed to prevent vegetation that created visual obstructions to vehicular highway traffic (this is in fact the implicit purpose of the Arkansas statute in question in the case at bar). The court further reasoned that the Federal act covered only that area immediately adjacent to the roadbed and was not designed nor intended to cover the entire right-of-way and that the state therefore had the right to control the vegetation on the remaining portion of the railroad right-of-way. The Fifth Circuit Court of Appeals further found that the Texas Commission drafted this requirement in response to a demonstrable safety need reflected in a 1985 study conducted by the National Transportation Safety Board. The study indicated that in recent train collisions with motor vehicles, obstructions, particularly vegetation obstructions, limited the driver's view along the railroad. The court further stated:

> "There are no Federal standards for minimum sight distance at train crossings . . ."

As set out in full at page 2 of this Respondent's Brief, the pertinent part of the Federal Railroad Safety Act of 1970, specifically 45 U.S.C. Section 434 (1982), provides two provisions whereby a state may adopt or continue to enforce a law concerning railroad safety. First, the state may adopt or continue to enforce such law until such time as the Secretary has adopted a law governing the subject matter of the state requirement. The second condition allowing a state to continue a law would result when it becomes necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any Federal law, rule, regulation, order or standard

and then when not creating an undue burden on interstate commerce.

The Appellant argues that before a state can pass or retain a law effecting railroad safety, that it must meet both tests and such is not the case. As a matter of fact, the Appellant in its Petition for Certiorari failed to cite any case which provides support for the test it is requesting this court to adopt. The plain meaning of the aforementioned Section of the Federal Railroad Safety Act is that a state must establish each of the elements of the aforementioned three prong exception to preemption if, and only if, the state law or regulation covers a Federally addressed railroad safety matter. It is apparent that there is not, nor has there ever been, any Federal minimum sight distance at train crossings regulations nor has there been any Federal regulations addressing the maintenance of railroad right of ways at these crossings. Therefore, since the subject matter of the Arkansas vegetation statute in the case at bar has not been addressed by the Federal rules and regulations, the aforementioned three pronged test of addressing a local safety hazard and not being incompatible with the Federal regulation and not creating an undue burden on interstate commerce is not applicable.

In determining whether we have preemption, we look first to ascertain Congressional intent; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In *Pacific Gas & Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983) citing *Rice* ". . . so, we start with the assumption that the historic police powers of the states were not to be superseded by the Federal activeness that was the clear manifest purpose of Congress." The states have been allowed to implement railroad safety requirements within their borders. In ascertaining Congressional intent we are helped by a discussion of H.R. 91-1194 *reprinted in* 1970 U.S. Code *Congressional & Administrative News* 4104, and 4105:

"Consequently there is a strong consensus which makes it appear clearly that *the time is now here for broad scale Federal legislation with provisions for active state participation to assure a much higher degree of railroad safety in the years ahead.*"

At Pages 4108, 4109: "With respect to the purported Bill S. 1933 the Task Force recommended that *existing state requirements remain in effect until preempted by federal actions.* The Department of Transportation in its proposal followed the Task Force recommendation with respect to existing state statutes and recommended that state statutes then in effect continue until preempted by Federal action . . . the Bill has passed by the Senate preserving existing state statutes until preempted. It also permitted the states to regulate in new areas until preempted."

At Pages 4116: *The "FRSA" provides, however, that until the Secretary acts with respect to a particular subject matter, a state may continue to regulate in that area.* Once the Secretary has prescribed a uniform national standard the state would no longer have authority to establish statewide standards with respect to rail safety. The state may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce."

This is in fact the language adopted in 45 U.S.C.A. Section 434 (1986) and is the exact language cited by the Arkansas Supreme Court as the basis for its determination that the rules and regulations promulgated under the Federal Railroad Safety Act had not preempted the aforementioned Arkansas vegetation statute.

It should be noted in the last paragraph of the Congressional & Administrative News cited above that there are two ways that a state can have a law covering rail-

road safety. One, until such time as the Secretary has regulated the area, and two, when it is necessary for local safety hazard. Again, the requirements of the local safety hazard law are not required to be met until such time as the area has been entirely preempted by Federal law.

It is clear by reading and contrasting the Federal regulation in question 49 C.F.R. Section 213.37, and the Arkansas statute, ACA 23-12-201, that there is no conflict between the two statutes and therefore the Federal regulation has not preempted the Arkansas statute. First of all, the Arkansas statute addresses a totally different set of circumstances than the language of the Federal regulation expressly addresses. The Federal regulation addresses the following reasons for controlling growth of vegetation in the railroad roadbed and the areas immediately adjacent thereto: to prevent fire hazards, to prevent obstruction of visibility of railroad signs and signals, to prevent interference with railroad employees performing normal track side duties, to assure proper functioning of signals and communication lines, and to assure that railroad employees will be able to visually inspect moving equipment from their normal duty stations. Whereas, the Arkansas statute in question, is designed to prevent the obstruction of the view of pedestrians and vehicle operators using the public highways which cross the railroad tracks. Furthermore, the aforementioned Federal regulation makes no mention of railroad right of ways at highway crossings, which is the specific emphasis and governed area covered by the Arkansas statute in question. The only area the Federal area addresses is the railroad roadbed and the areas immediately adjacent to the roadbed.

In summary, the law in general has never favored preemption, unless it was clearly an occupied field. Three of the major cases concerning preemption in the railroad arena have denied that federal law preempted state law.

The first case, *Norfolk & Western Railroad Company v. Pennsylvania Public Utility Commission*, 413 Atlantic 2d 1037 (1980); allowed state law concerning railroad equipment even though there was Federal law regulating very similar equipment. In *Chicago & Northwestern Railroad v. Labor & Industry Review Commission*, Wis. App., 283 N.W. 2d 603 (1979), the court ruled that Federal legislation in a field affecting interstate commerce does not necessarily preclude state legislation in the same area. In *Lipelt v. Norfolk & Western Railroad Company*, 378 N.E. 2d 1232 (1978) the court held that a switch light act in the state was not preempted even though Federal law had provisions covering switch lights. The court upheld the state law on the grounds that a slight technical difference existed between the requirements. A case somewhat on point is *Monongahela Connecting Railroad Company v. Pennsylvania Public Utility Commission*, 404 Atlantic 2d 1376 (1979) where the court held that the power of the Pennsylvania Public Utility Commission to order a railroad to install a signal light at a certain crossing was not preempted by a Federal law. The court stated in that opinion: ". . . regulations of one part of a very general area by Federal regulations while performing the same overall purposes as state regulations will not oust or displace the state regulations."

The court, in *State of Minnesota v. Burlington Northern, Inc.*, 247 N.W. 2d 54 (1976), stated that until the Federal Railroad Administration adopted regulations that "completely preempt an area, that state laws remain in full force and effect." In the instant case there is certainly no Federal law adopted to control vegetation at railroad crossings which might otherwise block the vision of an approaching motorist. Furthermore, what little Federal law which addresses vegetation growing in the railroad roadbed and areas immediately adjacent thereto certainly cannot be said to "completely preempt" the area

of vegetation control on all portions of railroad property and therefore any state laws addressing the areas not specifically covered by this Federal regulation should remain in full force and effect.

One of the most recent cases being determined by the U.S. Supreme Court in *Hillsborough County v. Automated Medical Laboratory, Inc.*, 471 U.S. 707, 85 Lawyers Edition 2d 714, 105 Supreme Court 23 71 (1985), which denied that a local regulation was preempted by Federal law, made a very thorough determination of the current existing law involving preemption. That case states that there is a presumption that the state or local regulation is valid.

The object of the Arkansas state law pertaining to vegetation on railroad property is clearly for the safety of the motorist and the prevention of railway accidents resulting from an inability of the motorist to observe the danger of an oncoming train. Federal law does not address this issue and it is doubtful that it was the intent of either state, Federal, or any other law that such a critically dangerous condition be permitted. It would be illogical to think that it was the intent of the Federal Railroad Administration to allow such a dangerous condition to exist. This conclusion is further enhanced by the House Committee on Interstate & Foreign Commerce's summary of the purpose of the Federal Railroad Safety Act of 1970, as follows:

> "The primary purpose of this legislation is set forth in Title I is to promote safety in all areas of railroad operations, to reduce railroad accidents, to reduce deaths and injuries to persons and to reduce property damage caused by accidents involving any carrier of hazardous materials."

H.R. Rep. No. 91-1194, 91st Congress, 2d Session (1970) reprinted in 1970 U.S. Code Congressional & Administrative News 4104, 4105; 45 U.S.C. Section 421 (1982).

Therefore, it is evident that the Arkansas statute is in line with Congress' intent to reduce deaths and injuries to persons and to reduce property damage caused by railroad accidents in that it addresses an area of railroad safety, specifically preventing the obstruction of the view of pedestrians and vehicle operators who use the public highway railroad crossings, which has not heretofore been addressed by any Federal legislation or regulation. For these reasons the Arkansas Supreme Court's decision upholding the validity of the aforementioned Arkansas Statute should be affirmed and the Appellant's Petition for Certiorari denied.

CONCLUSION

The Arkansas Supreme Court correctly held that the Arkansas vegetation statute governing vegetation growing in the railroad right of way was not preempted by a Federal regulation covering the growth of vegetation in the roadbed and areas immediately adjacent thereto. The legislative history of the Federal Railroad Safety Act of 1970 establishes that Congress did not intend to preempt state regulations that are not in conflict with nor covered by Federal regulations, such as in the case at bar. It is evident in the case at bar that there is no Federal legislation or regulation covering minimum sight distance at public highway railroad crossings, and that such regulations by the state further the intent of Congress by reducing personal injuries and accidents through preventing the obstruction of the view of pedestrians and vehicle operators who use the public highways at such railroad crossings. The decision of the Arkansas Supreme Court upholding the state vegetation statute furthers Congress' especially announced purpose of the Federal Railroad Safety Act by promoting safety in all areas of railroad operations by reducing railroad related accidents, and reducing deaths and injuries to persons and property caused by railroad accidents. Furthermore,

the Arkansas Supreme Court's proper application of the preemption test as established in *Hillsborough County Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985), resulted in the proper finding that the aforementioned Arkansas vegetation statute was not preempted by Federal law. For these reasons, the question presented by the Appellant is so insubstantial as to require a denial of the Appellant's Petition for Certiorari and an affirmance of the Arkansas Supreme Court's decision upholding the validity of the heretofore mentioned Arkansas Statute.

Respectfully submitted,

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In fact, it is quite evident that the state and Federal laws can be read without conflict. Therefore, Ark. Code Ann. Section 23-12-201 (1987) has not been preempted by Federal law.

VI. THE TRIAL COURT ERRED IN ITS EVIDENTIARY RULINGS

We note the various rulings on evidence presented because they may be relevant on retrial. The basic rule is that the admittance into the record of testimony or other evidence is a diseretionary matter with the trial court. We have previously mentioned the introduction of the model as being within the discretion of the court. It may be that no objections will be raised at the second trial or objections which were not raised before may be raised. There may be additional information added or the model may be otherwise updated. We cannot anticipate the manner or presentation at the next trial.

Jim Corgill, a former employee of Missouri Pacific Railroad Company, testified that other employees had told him that they had requested the railroad to do something about the condition of the growth on the right of way. Proper objection was made on the basis of hearsay. The Appellee argues that they were not offered to prove the truth of the matter stated, an exception to ARE 801, but rather to show that conditions of the right of way had been brought to the attention of the railroad officials. Such testimony was obviously an attempt to prove the truth of the matter asserted. Under the conditions as they existed at the time of the trial, it was error for the court to allow this hearsay testimony.

During cross examination of the Appellee, counsel for Appellant requested permission to read two pages from the Plaintiff's discovery deposition. The court sustained the Plaintiff's objection. We agree with the Appellant that ARCP Rule 32 (2) provides that the deposition of

a party may be used by the adverse party for any purpose at the trial. However, we cannot discern any prejudice on the record as it stands. This again is a matter which will not likely duplicate itself on retrial.

VII. UNION PACIFIC RAILROAD COMPANY SHOULD HAVE BEEN DISMISSED AS A PARTY

Appellant is correct on the matter of dismissing the action against Union Pacific Railroad Company. The answers to interrogatories clearly reveal that Union Pacific Railroad Company and Missouri Pacific Railroad Company are sister corporations owned by the Union Pacific Corporation. There was no evidence at all in the record to indicate that Union Pacific Railroad Company was in anyway involved in this occurrence. It was a Missouri Pacific railroad and the train was owned by Missouri Pacific. The operators of the train were employees of Missouri Pacific. No nexus having been shown connecting Union Pacific Railroad to the matters involved, we agree that it should not have been a party to this action. Therefore, the judgment as to the Union Pacific Railroad Company is reversed.

Reversed and remanded with directions to proceed in a manner not inconsistent with this opinion.

Holt, C.J., and Glaze, J., concur in part and dissent in part.

Hays, J., dissents.